UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 74

Docket No. DC-0731-08-0563-I-1

Wayne Upshaw,

Appellant,

v.

Consumer Product Safety Commission,

Agency.

April 24, 2009

Brian C. Plitt, Esquire, Washington, D.C., for the appellant.

Margaret H. Plank, Esquire, Bethesda, Maryland, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision, issued on July 21, 2008, that dismissed the appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition, VACATE the initial decision, and REMAND the appeal for a jurisdictional hearing.

BACKGROUND

¶2 The appellant filed an appeal on June 10, 2008, in which he alleged that the agency made a negative suitability determination and removed him from the Senior Executive Service (SES) position of Chief Financial Officer, ES-0505-05. Initial Appeal File (IAF), Tab 1. The agency filed a response asserting that it

made no determination regarding the appellant's suitability for federal employment, but that instead, the agency withdrew the job offer before the appellant was officially appointed to the position. IAF, Tab 6, Subtab 1.

¶3 The record shows that, in a letter dated May 6, 2008, the agency confirmed its tentative offer and the appellant's acceptance of the Chief Financial Officer position. IAF, Tab 6, Subtab 4E. The agency's letter advised the appellant that he was required to complete an electronic questionnaire for investigations processing and Optional Form 306, Declaration of Federal Employment. *Id*. On May 20, 2008, prior to the agency's receipt of the appellant's completed forms, the agency received the appellant's Official Personnel File (OPF) from the Library of Congress where the appellant was most recently employed. IAF, Tab 6, Subtabs, 4B at 2, 4D. The OPF contained the appellant's most recent standard form (SF)-50, notification of personnel action, which documented his October 12, 2007 termination during his probationary/trial period from the position of Social Science Analyst in the Library of Congress, and which he had not provided to the agency as required by the vacancy announcement. IAF, Tab 6, Subtabs 4A at 2-3, 11, 4D at 1. The agency contacted the appellant on May 21, 2008, and rescinded the offer of employment. IAF, Tab 6, Subtabs 4A at 4, 4B at 3.

¶4 Because there appeared to be a jurisdictional issue, the administrative judge (AJ) ordered the appellant to provide evidence and argument showing that the Board has jurisdiction over this appeal as either a negative suitability determination or a removal. IAF, Tab 3. After considering the responses from both parties, including the declarations submitted by agency employees, the AJ dismissed the appeal upon finding that the agency withdrew its tentative offer of employment to the appellant after receiving his OPF and learning that he had been terminated from a prior position with the Library of Congress, which the appellant had concealed from the agency by failing to submit his most recent SF-50 as required by the vacancy announcement. IAF, Tab 7, Initial Decision (ID) at 4, 6. The AJ found further that, because the agency's determination to withdraw

the offer was based on the appellant's concealment of the fact that he had been terminated from his last position, the agency made a suitability determination involving a material, intentional false statement or deception or fraud in examination or appointment, a determination that was outside the scope of its delegated authority and beyond the Board's jurisdiction. *Id*. at 4. To the extent the appellant argued that he was removed from the position, the AJ found no evidence showing that the appellant was ever appointed by the authorizing authority or that the appellant had effectively entered on duty, since he had not even submitted the required security forms at the time that the agency rescinded its job offer. *Id*. at 5. Thus, the AJ found that the appellant failed to make a nonfrivolous allegation that the agency "canceled his appointment after it actually occurred." *Id*.

¶5 On PFR,[1] the appellant asserts that the AJ erred in finding, without holding a hearing, that the agency withdrew the job offer because he had concealed his termination from his last position, given that the agency specifically stated that it withdrew the offer "because it received documentation of termination of prior employment for cause and because [the appellant] failed to complete the necessary paperwork in a timely manner." Petition for Review File (PFRF), Tab 1 at 8; *see* IAF, Tab 6, Subtab 1 at 8. In addition, the appellant contends that the agency made an appealable suitability determination based upon his "character or conduct," which it gleaned from information in the SF-50 concerning his termination from the Library of Congress. PFRF, Tab 1 at 9. The agency likewise asserts in its response to the PFR that the AJ's reasoning for dismissing the appeal was erroneous. The agency contends that, because the offer

[1] We note that the appellant does not challenge the AJ's determination that he was not removed from the Chief Financial Officer position because the agency never appointed him to that position. We therefore need not address that issue further. *See* 5 C.F.R. § 1201.114(b) (the Board normally will consider only issues raised in a timely filed PFR or cross-PFR).

was withdrawn before the initiation of a background investigation, it never made a determination as to the appellant's suitability for federal employment. PFRF, Tab 3 at 8-9.

ANALYSIS

¶6 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The appellant has the burden of proof on the issue of jurisdiction. 5 C.F.R. § 1201.56(a)(2)(i).

¶7 In determining whether the Board has jurisdiction over this appeal, we note that in general, an unsuccessful candidate for a federal civil service job has no right to appeal his non-selection. *See Tines v. Department of the Air Force*, 56 M.S.P.R. 90, 93 (1992). Nevertheless, pursuant to regulations promulgated by the Office of Personnel Management (OPM) and revised as of January 1, 2008, the Board has jurisdiction over certain matters involving suitability for employment in positions in the competitive service and career appointments to positions in the SES. *See* 5 C.F.R. §§ 731.101, 731.501. A suitability determination is directed toward whether the "character or conduct" of a candidate or current employee is such that employing or continuing to employ him would adversely affect the integrity or efficiency of the service. 5 C.F.R. §§ 731.101(a), 731.201. The many factors that might be relied upon in rendering a negative suitability determination include falsification, deception or fraud in the examination process, and misconduct or negligence in employment. 5 C.F.R. § 731.202(b). Thus, under 5 C.F.R. § 731.501(a), "[a]n individual who has been found unsuitable for employment may appeal the determination to the Merit Systems Protection Board." Similarly, under 5 C.F.R. § 731.103(g), "[a]ny applicant or appointee who is found unsuitable by any agency acting under delegated authority from OPM under this part may appeal the adverse suitability decision to the Merit Systems Protection Board . . . ." Further, under 5 C.F.R.

§ 731.203(a)(2), a "[d]enial of appointment" is listed as an "action" that could be taken by OPM or the agency and challenged before the Board. *See* 5 C.F.R. § 731.501(a) ("[i]f the Board sustains fewer than all of the charges, the Board shall remand the case to OPM or the agency to determine whether the action taken is still appropriate"). The Board has previously held that, based on the above regulations, if the evidence shows that the candidate was actually found qualified for the position at issue, and the agency later removed him from consideration based on one of the reasons set forth under OPM's suitability guidelines involving the "character or conduct" of the candidate, then the Board may conclude that the candidate was subjected to an appealable "constructive suitability determination." *See Saleem v. Department of the Treasury*, 88 M.S.P.R. 151, ¶¶ 7, 11 (2001); *Edwards v. Department of Justice*, 87 M.S.P.R. 518, ¶ 9 (2001); *Edwards v. Department of Justice*, 86 M.S.P.R. 365, ¶¶ 11-14 (2000). The Board has further held that, in deciding whether an action is a nonappealable non-selection or an appealable suitability determination, what matters is the substance, not the form, of the action. *Saleem*, 88 M.S.P.R. 151, ¶ 7.

¶8 However, in April 2008, OPM issued revised suitability regulations, "effective June 16, 2008," 73 Fed. Reg. 20,149 (Apr. 15, 2008). Under the new 5 C.F.R. § 731.501(a), only a "suitability action" may be appealed to the Board. A "suitability action" is defined as a "[c]ancellation of eligibility," a removal, a cancellation of reinstatement eligibility, and a debarment. 5 C.F.R. § 731.203(a). Thus, OPM removed from § 731.203(a) a "[d]enial of appointment" as an "action." In addition, the new regulations specify that a non-selection for a specific position is not a suitability action even if it is based on reasons set forth at 5 C.F.R. § 731.202. *See* 5 C.F.R. § 731.203(b). Moreover, the new 5 C.F.R. § 731.103(g) includes no language that refers to appeals to the Board. Finally, the new regulations include a savings provision which states the following:

> No provision of the regulations in this part is to be applied in such a way as to affect any administrative proceeding pending on June 16, 2008. An administrative proceeding is deemed to be pending from the date of the agency or OPM "notice of proposed action" described in §§ 731.302 and 731.402.

5 C.F.R. § 731.601. OPM explained that its new regulations were issued, in part, to correct Board case law which had held that "what matters is the substance of the action, not the form," which OPM determined to be erroneous and beyond the intent of Congress. 73 Fed. Reg. at 20,152. OPM concluded that "when adjudicating an appeal of an agency action, the Board must assess the agency's action under the procedures elected by the agency and may not hold the agency to standards relating to a legal authority that the agency did not invoke." *Id*.

¶9 In determining whether the new regulations retroactively apply in this case, we have considered the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). *See Rodriguez v. Peake*, 511 F.3d 1147, 1152-56 (Fed. Cir. 2008) (applying *Landgraf* in deciding whether to retroactively apply an amended regulation); *Goodyear Tire & Rubber Co. v. Department of Energy*, 118 F.3d 1531, 1536 (Fed. Cir. 1997) (applying *Landgraf*, by analogy, to determine whether an agency may lawfully apply a newly-issued rule to disputes that are pending before it); *Terrell v. Department of the Treasury*, 73 M.S.P.R. 689, 692 (1997) (applying *Landgraf* in determining whether to retroactively apply a change in the Board's regulations). In *Landgraf*, 511 U.S. at 280, the Court held that "[w]hen a case implicates a federal statute enacted after the events in the suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." When the statute contains no express command, a court must determine whether the statute would have retroactive effect, i.e., whether it would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. If the statute would "operate

retroactively," the court must apply a presumption that the statute "does not govern absent clear congressional intent favoring such a result." *Id.*

¶10 Here, because OPM's new regulations, if applied to pending cases, would have the effect of destroying Board jurisdiction, for example, over an appellant's pending claim that his denial of appointment is a suitability action, the new regulations impair an appeal right to the Board an appellant possessed at the time of his non-selection. Thus, we find that, under *Landgraf* and its progeny, the new suitability regulations would have a retroactive effect if applied to pending cases.

¶11 Moreover, we are guided by the Supreme Court's decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). In *Bowen*, the Court held that an agency may not promulgate retroactive regulations unless the power to do so has been conveyed by Congress in express terms. *Id.* at 208*; see also Princess Cruises, Inc. v. U.S.*, 397 F.3d 1358, 1362 (Fed. Cir. 2005) (citing *Bowen*). "Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Bowen*, 488 U.S. at 208.

¶12 The right to appeal a suitability action is found in 5 C.F.R part 731. *Zufan v. Department of Transportation*, 91 M.S.P.R. 258, ¶ 9 (2002). However, as the Board recognized in *Zufan*, the authority for the regulations at 5 C.F.R. part 731 derives from statutes, specifically 5 U.S.C. §§ 1302, 3301, and 7701. *See Zufan*, 91 M.S.P.R. 258, ¶ 10. In none of these statutes does Congress expressly grant OPM the authority to issue retroactive regulations relating to suitability or any other topic. Accordingly, we find that, because Congress has not granted OPM the authority to issue a retroactive regulation relating to suitability, the new suitability regulations cannot be given retroactive effect, regardless of OPM's intent. Thus, the suitability regulations in effect at the time of the appellant's non-selection will govern in this matter.

¶13 Where an appellant makes a nonfrivolous allegation that the Board has jurisdiction over an appeal, the appellant is entitled to a hearing on the

jurisdictional question, *Yiying Liu v. Department of Agriculture*, 106 M.S.P.R. 178, ¶ 8 (2007); *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). Nonfrivolous allegations of Board jurisdiction are allegations of fact, which if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Ferdon*, 60 M.S.P.R. at 329. To meet the nonfrivolous standard, an appellant need only plead allegations of fact which, if proven, could show jurisdiction, though mere pro forma allegations are insufficient to satisfy the nonfrivolous standard. *Yiying Liu*, 106 M.S.P.R. 178, ¶ 8. In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, the AJ may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the AJ may not weigh evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive. *Yiying Liu*, 106 M.S.P.R. 178, ¶ 8; *Ferdon*, 60 M.S.P.R. at 329.

¶14 Here, because it appeared that the Board may not have jurisdiction over the appeal, the AJ ordered the parties to provide evidence and argument concerning the appellant's claims that the agency made a negative suitability determination and removed him from the SES position of Chief Financial Officer. IAF, Tab 3. This order specifically advised the appellant that he had to show that the agency has been delegated the authority by OPM to make suitability determinations, that the determination was within the delegated authority, and that the determination was based on suitability factors listed in 5 C.F.R. part 731. *Id*.

¶15 The agency responded by submitting evidence showing that on May 20, 2008, it received the appellant's OPF from the Library of Congress, which indicated that it had terminated the appellant during his probationary period. IAF, Tab 6, Subtabs 4B at 2, 4D at 1. In a declaration, sworn under penalty of perjury, Beth Schwab, Deputy Director, Office of Human Resources Management (EXRM), stated that she contacted the Human Resources Office at the Library of

Congress, which confirmed that the authority code cited on the appellant's termination SF-50 was based on "conduct or delinquency after entrance on duty." IAF, Tab 6, Subtab 4B at 2. Ms. Schwab stated further that she advised Donna Simpson, Director, EXRM, and Patsy Semple, Executive Director for the agency, to consider the following facts:

> (1) the Appellant had a break in federal service over 30 days; (2) the Agency had not received Appellant's completed security forms; (3) the fingerprint chart of the Appellant submitted by the Agency was returned unclassifiable by the FBI and a second set of fingerprints had to be taken and resubmitted; (4) the incorrect SF-50 was submitted by Appellant with his application for employment; and [sic] (5) the Termination SF-50 in the Appellant's OPF made it necessary for the Appellant to favorably complete the background investigation prior to appointment; and (6) upon receipt of forms from the Appellant and submission to OPM, the processing time for the required investigation conducted by OPM would have been 120-days.

Id. at 2-3. Ms. Schwab stated that, because the agency had a "critical need to fill the high-profile Senior Executive position quickly," Ms. Simpson directed her to notify the appellant that the agency had decided to withdraw its tentative offer of employment. *Id*. at 3. In addition, Ms. Schwab stated that she contacted the appellant at approximately 11:00 a.m. on May 21, 2008, to advise him that the agency was withdrawing the tentative offer of employment, and she also stated that the agency did not receive the appellant's preliminary paperwork necessary to initiate the background investigation until after she had notified him that the job offer was rescinded. *Id*. Ms. Schwab further stated that the agency "did not complete a background investigation on Appellant, and did not make a determination regarding his suitability for federal government." *Id*.

¶16 Supporting Ms. Schwab's declaration is a second declaration, signed under penalty of perjury, from Ms. Simpson, in which she states that, after the agency received the appellant's OPF from the Library of Congress, she consulted with Ms. Schwab and Ms. Semple to consider the impact the factors set forth by Ms.

Schwab would have on the agency's ability to fill the position quickly. IAF, Tab 6, Subtab 4A at 2-3. Ms. Simpson stated that, based on the projected delay in filling the position, she directed Ms. Schwab to notify the appellant that the agency's tentative offer of employment was withdrawn. *Id*. Ms. Simpson also stated that the agency did not complete a background investigation on the appellant, that the agency made no determination regarding the appellant's suitability for federal employment, and that the agency did not receive the appellant's preliminary paperwork until after Ms. Schwab had notified him that the offer of employment was rescinded. *Id*.

¶17 The AJ subsequently considered all of the evidence described above and found that the appellant made no nonfrivolous allegations of facts which, if true, would establish Board jurisdiction over this appeal, and issued an initial decision based on the written record. ID at 1-6. Specifically, the AJ found, inter alia, that "the agency withdrew its tentative offer of employment to the appellant after receiving his OPF and learning that he had been terminated from a prior position, a fact that he had concealed from the agency by failing to submit his most recent SF-50 as required by the vacancy announcement." ID at 4. The AJ then found that the appellant "continued to conceal this fact by denying it on OP 306 and stating on the electronic questionnaire that he left the position under favorable circumstances when his 'conditional appointment [was] not converted to permanent status.'" *Id*. The AJ found further that the agency made a determination to withdraw the position offer "based on the appellant's concealment of the fact that he had been terminated from his last position," and thus, "the agency made a suitability determination involving a material, intentional false statement or deception or fraud in examination or appointment, a determination that was outside the scope of its delegated authority." *Id*. Thus, the AJ dismissed the appeal for lack of jurisdiction without a hearing.

¶18 However, taking the appellant's allegations as true, we find that the appellant met the requisite nonfrivolous standard under *Ferdon* when he alleged

that the agency made a constructive negative suitability determination, which OPM authorized it to do within its delegated authority, when it rescinded the offer of employment after receiving his OPF from the Library of Congress, which indicated that it had terminated him during his probationary period. IAF, Tab 4 at 3-4. Because the appellant's claim that the employment offer was rescinded after the agency received his OPF from the Library of Congress is supported by documentary evidence, including the appellant's declaration signed under penalty of perjury, IAF, Tab 4 at 6-8, the Board can infer from the written record that the rescission of the offer of employment possibly could have been a constructive suitability determination. *See Edwards*, 87 M.S.P.R. 518, ¶ 9 (if evidence shows a candidate had actually been found qualified for the position and the agency later removed him from consideration based on one of the reasons set forth under OPM's guidelines at 5 C.F.R. § 731.202, the Board may conclude the appellant was subjected to a constructive suitability determination); 5 C.F.R. § 731.202 (among the reasons in OPM's guidelines are misconduct or negligence in employment, and material, intentional false statement, or deception or fraud in examination or appointment).

¶19 Because the record supports the appellant's contention that the agency's rescission of the offer of employment could have constituted a constructive suitability determination within the agency's delegated authority, *see* 5 C.F.R. § 731.103 (Jan. 1, 2008), the appellant has stated an adequate prima facie case of jurisdiction and the AJ should not have accepted the agency's evidence as dispositive. Therefore, we find that the AJ erred when, without holding a jurisdictional hearing,[2] she credited the agency's evidence to find that the agency

[2] We note that the AJ's characterization of the agency's argument in this regard is not accurate. Specifically, there is nothing in the record to support the AJ's finding that the agency made a determination to withdraw the position offer "based on the appellant's concealment of the fact that he had been terminated from his last position." Rather, the agency explicitly argued, and provided declarations in support, that this was not the basis for the rescission of the employment offer. *See* IAF, Tab 6, subtabs 1 at 6, 4A,

made a suitability determination that was outside of its scope of delegated authority. *Saleem*, 88 M.S.P.R. 151, ¶¶ 8-11, 13; *Ferdon*, 60 M.S.P.R. at 329-30. Accordingly, we find it necessary to remand this case for a jurisdictional hearing on the issue of whether the rescission of the agency's offer of employment constituted a constructive suitability determination within the agency's delegated authority.

ORDER

¶20 Accordingly, we find that the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing. On remand, the AJ shall hold a hearing to allow the presentation of evidence and argument on whether the Board has jurisdiction over this appeal. *Ferdon*, 60 M.S.P.R. at 329. Further, in making a jurisdictional determination, the AJ shall apply Board law under *Edwards*, 87 M.S.P.R. 518, to determine whether the agency made a "constructive suitability" determination when it rescinded the offer of employment that it had extended to the appellant. The AJ shall then issue a new initial decision.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

4B. Nevertheless, we have made no findings concerning the AJ's error in this regard because it would require us to weigh evidence and resolve conflicting assertions of the parties, which we cannot do prior to a jurisdictional hearing being held. *Ferdon*, 60 M.S.P.R. at 329.